

any trade secrets, processes, operations, apparatus, confidential data, or any other matter prohibited by statutes such as but not limited to 26 U.S.C. 6103 or 18 U.S.C. 1905.

(g) *Comments received in response to a notice of proposed rulemaking.* Written comments received in response to a notice of proposed rulemaking may be inspected by any person upon compliance with the provisions of this paragraph. Comments may be inspected in the Disclosure Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226. The request to inspect comments must be in writing and signed by the person making the request and should be addressed to the Director, Attention: Chief, Disclosure Branch, Washington, DC 20226. Upon delivery of such a written request to the place where the comments are located during the regular business hours of that office, the person making the request may inspect those comments. Copies of comments (or portions thereof) may be obtained by a written request addressed to the Chief, Disclosure Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226. The person making the request for copies should allow a reasonable time for processing the request. The provisions of 31 CFR 1.7, relating to fees, apply with respect to requests made in accordance with this paragraph.

(27 U.S.C. 205; 22 U.S.C. 2778; 26 U.S.C. 7602; 5 U.S.C. 301)

[T.D. ATF-47, 43 FR 10687, Mar. 15, 1978, as amended by T.D. ATF-57, 44 FR 20794, May 9, 1979; T.D. ATF-201, 50 FR 12533, Mar. 29, 1985; T.D. ATF-249, 52 FR 5961, Feb. 27, 1987. Redesignated and amended by T.D. ATF-378, 61 FR 29955, 29956, June 13, 1996.]

**§ 70.803 Requests or demands for disclosure in testimony and in related matters.**

(a) *Authority.* The provisions of this section are prescribed under the authority of 5 U.S.C. 301; section 2 of Reorganization Plan No. 26 of 1950 (64 Stat. 1280); 12 U.S.C. 3412; 18 U.S.C. 1905; section 2(g) of the Federal Alcohol Administration Act (27 U.S.C. 202(c)); and sections 5274, 6103, 7213, 7803 and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 5274, 6103, 7213, 7803 and 7805).

(b) *Definitions.* The following definitions apply whenever the defined terms appear in this section.

(1) *ATF officer or employee.* The terms *ATF officer* and *ATF employee* mean all officers and employees of the United States, engaged in the administration and enforcement of laws administered by the Bureau of Alcohol, Tobacco and Firearms, and appointed or employed by, or subject to the directions, instructions or orders of, the Secretary of the Treasury or his delegate.

(2) *ATF records or information.* The terms *ATF records* and *ATF information* mean any records (including copies thereof) or information, made or obtained by, furnished to, or coming to the knowledge of, any ATF officer or employee while acting in his official capacity, or because of his official status, with respect to the administration of laws administered by or concerning the Bureau of Alcohol, Tobacco and Firearms.

(3) *Demand.* The term *demand* means any subpoena, notice of deposition either upon oral examination or written interrogatory, or other order, of any court, administrative agency, or other authority.

(c) *Disclosure of ATF records or information prohibited without prior approval of the Director.* The disclosure, including the production, of ATF records or information to any person outside the Department of the Treasury or to any court, administrative agency, or other authority, in response to any request or demand for the disclosure of such records or information shall be made only with the prior approval of the Director. However, nothing in this section shall restrict the disclosure of ATF records or information which the Director has determined is authorized under any provision of statute, Executive order, or regulations, or for which a procedure has been established by the Director. For example, this section does not restrict the disclosure of ATF records or information under § 71.22, nor does it restrict the disclosure of ATF records or information which is requested by U.S. attorneys or attorneys of the Department of Justice for use in cases which arise under the laws administered by or concerning the Bureau of Alcohol, Tobacco and Firearms

and which are referred by the Department of the Treasury to the Department of Justice for prosecution or defense.

(d) *Delegation to Director of authority to determine disclosure and establish procedures.* The Director is hereby authorized to determine whether or not ATF officers and employees will be permitted to disclose ATF records or information in response to:

(1) A request by any court, administrative agency, or other authority, or by any person, for the disclosure of such records or information; or

(2) A demand for the disclosure of such records or information.

The Director is also authorized to establish such other procedures as he may deem necessary with respect to the disclosure of ATF records or information by ATF officers and employees. Any determination by the Director as to whether ATF records or information will be disclosed, or any procedure established by him in connection therewith, shall be made in accordance with applicable statutes, Executive orders, regulations, and any instructions that may be issued by the Secretary or his delegate. Notwithstanding the preceding provisions of this paragraph, the Director shall, where either he or the Secretary deems it appropriate, refer the opposing of a request or demand for disclosure of ATF records or information to the Secretary.

(e) *Procedure in the event of a request or demand for ATF records or information*—(1) *Request procedure.* Any ATF officer or employee who receives a request for ATF records or information, the disposition of which is not covered by a procedure established by the Director, shall promptly communicate the contents of the request to the Director through the appropriate supervisor for the district or region in which he serves. The officer or employee shall await instructions from the Director concerning the response to the request. For the procedure to be followed in the event a person making a request seeks to obtain a court order or other demand requiring the production of ATF records or information, see paragraph (e)(2) of this section (immediately below).

(2) *Demand procedure.* Any ATF officer or employee who is served with a demand for ATF records or information, the disposition of which is not covered by a procedure established by the Director, shall promptly, and without awaiting appearance before the court, administrative agency, or other authority, communicate the contents of the demand to the Director through the appropriate supervisor for the district or region in which he serves. The officer or employee shall await instructions from the Director concerning the response to the demand. If it is determined by the Director that the demand should be opposed, the U.S. attorney, his assistant, or other appropriate legal representative shall be requested to respectfully inform the court, administrative agency, or other authority that the Director has instructed the officer or employee to refuse to disclose the ATF records or information sought. If instructions have not been received from the Director at the time when the officer or employee is required to appear before the court, administrative agency, or other authority in response to the demand, the U.S. attorney, his assistant, or other appropriate legal representative shall be requested to appear with the officer or employee upon whom the demand has been served and request additional time in which to receive such instructions. In the event the court, administrative agency, or other authority rules adversely with respect to the refusal to disclose the records or information pursuant to the instructions of the Director, or declines to defer a ruling until instructions from the Director have been received, the officer or employee upon whom the demand has been served shall, pursuant to this section, respectfully decline to disclose the ATF records or information sought.

(3) *Affidavit required for testimony.* If testimony of an ATF officer or employee is sought by a request or demand on behalf of a party other than a State in any case or matter in which the United States is not a party, an affidavit, or if that is not feasible, a statement shall be submitted. The affidavit or statement shall be prepared by the party (or party's attorney) seeking

the testimony, and shall set forth a summary of the testimony sought and its relevance to the proceedings. The affidavit or statement must be submitted before permission to testify may be granted. The Director may, upon request and for good cause shown, waive the requirement of this paragraph.

(4) *Time limit for serving request or demand.* The request or demand, together with the affidavit or statement (if required by paragraph (e)(3) of this section), shall be served at least 5 working days prior to the scheduled date of testimony or disclosure of records, in order to ensure that the Director has adequate time to consider whether to grant the request or demand. The Director may, upon request and for good cause shown, waive the requirement of this paragraph.

(5) *Factors to be considered in determining whether a request or demand will be granted.* The Director shall consider whether granting the request or demand would be appropriate under the relevant rules of procedure and substantive law concerning privilege. Among the requests or demands that will not be granted are those that would, if granted, result in—

(i) The violation of a statute, such as 26 U.S.C. 6103 or 7213, or a rule of procedure, such as the grand jury secrecy rule (F.R.Cr.P. Rule 6(e)), or a specific regulation;

(ii) The disclosure of classified information;

(iii) The disclosure of a confidential source or informant, unless the ATF officer or employee and the source or informant, have no objection;

(iv) The disclosure of investigative records compiled for law enforcement purposes if enforcement proceedings would thereby be impeded, or of investigative techniques and procedures whose effectiveness would thereby be impaired, unless the Director determines that the administration of justice requires disclosure;

(v) The disclosure of trade secrets without the owner's consent; or

(vi) Testimony in a case in which ATF has no interest, records or other official information.

(f) *State cases.* Regional directors (compliance), special agents in charge,

chiefs of field laboratories, and regional administrative officers, may, in the interest of Federal and State law enforcement, upon receipt of demands or requests of State authorities, and at the expense of the State, authorize employees under their supervision to attend trials and administrative hearings in liquor, tobacco, firearms, or explosives cases in which the State is a party or on behalf of the State in any criminal case, to produce records, and to testify as to facts coming to their knowledge in their official capacities. However, in cases where a defendant in a criminal case requests or demands testimony or the production of ATF records or information, authorization from the Director is required. Production or testimony may not divulge information contrary to 26 U.S.C. 6103 and 7213, or 12 U.S.C. 3412. See also 18 U.S.C. 1905.

(g) *Penalties.* Any ATF officer or employee who disobeys the provisions of this section will be subject to dismissal and may incur criminal liability.

[T.D ATF-57, 44 FR 27094, May 9, 1979, as amended by T.D. ATF-302, 55 FR 47325, Nov. 13, 1990. Redesignated by T.D. ATF-378, 61 FR 29955, June 13, 1996]

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